Supreme Court, U. S.
FILED
APR 25 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-206

THERMTRON PRODUCTS, INC. (erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY ..... RESPONDENT

BRIEF AND APPENDIX OF RESPONDENT

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BRIEF AND APPENDIX OF RESPONDENT

I. STATUTES INVOLVED

The statutes to be construed are United States Code, Title 28, Sections 1332, 1441 and 1447. They appear in their entirety in the Appendix to this brief, Pages 1a through 4a.

II. QUESTIONS PRESENTED

A. Did the Congress, in requiring the District Court to remand where "the case was removed improvidently", intend to vest in the District Judge a discretion to remand where removal was unnecessary in order to obtain an impartial tribunal?

B. Did the Congress, in providing that a remand order "is not reviewable on appeal or otherwise", intend to vest in the District Court sole discretion to remand and thus deprive the Courts of Appeals and this Court of jurisdiction to consider a remand order, whether by appeal, prohibition or mandamus?

III.

SUPPLEMENTAL STATEMENT OF THE CASE

The respondent, prior to remand, entered a show cause order granting petitioners ten days within which to show how they would be prejudiced by remand to the Pike County, Kentucky, Circuit Court, where an immediate trial could be obtained. (A, 14-15). Petitioners responded claiming that the jurisdictional steps relating to removal had been properly taken and that petitioners "continue to so believe that their interest can best be served by insisting upon the jurisdiction of the United States District Court for the Eastern District of Kentucky." (A, p. 16).

No factual reason or basis was given to support a belief that a fair and impartial trial could not be obtained in the state court. No basis for prejudice in the state court has been suggested or asserted in the United States Circuit Court of Appeals or in this Court. The District Judge was well aware that the state court involved has two able judges, time immediately available to hear this case and the trial which would be accorded petitioners would be as impartial as in the District Court.

IV. SUMMARY OF ARGUMENT

A. The Congress intended to narrow the ambit of retention of removal cases based upon diversity of ciizenship to only those cases where removal jurisdiction exists and removal was providently made to avoid local prejudice. Removal to secure an impartial tribunal is improvidently made when the state court is in fact an impartial tribunal. Whether removal to obtain an impartial tribunal is improvident depends upon all of the facts and circumstances, and the Congress intended to vest in the District Judge a discretion in making that determination. The burden was on the petitioners seeking to sustain jurisdiction to demonstrate factually the partiality of the state tribunal, and having failed to do so, respondent properly remanded.

B. There is no constitutional right to an appeal. Congress provided that a remand order "is not reviewable on appeal or otherwise". This Court could not have entertained jurisdiction by an appeal. Similarly, it cannot entertain jurisdiction otherwise, such as through prohibition or mandamus.

V. ARGUMENT

A. CONGRESS INTENDED TO VEST IN THE DISTRICT COURT DISCRETIONARY REMAND AUTHORITY IN DIVERSITY REMOVAL CASES WHERE REMOVAL WAS IMPROVIDENTLY MADE ON THE ERRONEOUS BASIS THAT THE STATE COURT WOULD NOT AFFORD AN IMPARTIAL TRIBUNAL.

Jurisdiction based upon diversity of citizenship has as its basic object "to secure a tribunal presumed to be more impartial than a court in the state in which one of the litigants resides"[1]. *Barrow Steamship Co.* vs. *Kane,* 170 U.S. 100, at 111, 18 S. Ct. 526, 42 L. Ed. 964 (1897); *Anaconda Copper Mining Co.* vs. *Balak Lava Co.*, 200 Fed. 808 (Montana, 1912).

Original diversity jurisdiction is far broader than diversity removal jurisdiction. In original diversity jurisdiction the action may be filed in the federal court even by the citizen of the state in which the action is filed, so long as the requisite diversity and jurisdictional amount exists. Congress withheld any power to dismiss because improvidently commenced in federal court. 28 U.S.C. Section 1332.

Removal diversity jurisdiction is far more limited. Removal jurisdiction does not exist where one of the defendants is a citizen of the state in which the action was commenced. 28 U.S.C. Section 1441 (b). Remand is expressly authorized by 28 U.S.C., Section 1447. The Congress thus shows a strong intent to permit removal in diversity cases only where jurisdiction to remove is present and the removal is providently made for the purpose of securing an impartial tribunal.

The petitioners would assert that all they need to retain a federal forum is to show diversity removal jurisdiction. Yet 28 U.S.C. Section 1447 (c) authorizes remand for both improvident removal and lack of jurisdiction.

Remand because the Court is "without jurisdiction" is clear and explicit. The existance of removal jurisdiction depends upon appropriate diversity, taking the jurisdictional steps required for removal and the like. Remand for improvident removal can mean only remand where an impartial tribunal exists in the state court.

Improvident removal implicitly involves a determination by the District Court based upon discretion. The District Court is required to remand when "it appears that the case was removed improvidently." Congress is thus saying the District Judge should remand when *it appears to him* that the removal to "secure a more impartial tribunal" was

improvident. See the discussion by Judge Sirica in *City of Burlington, Vermont* vs. *Westinghouse Electric Corp.*, 246 F. Supp. 839, 841-842 (1965).

Respondent suggests that the Congress intended the District Judge to remand where "the case was removed improvidently" because an impartial tribunal exists in the state court. This is not only consistent with the plain language of the statute but it also conforms to the general congressional intent to restrict the removal jurisdiction of the federal courts. *Shamrock Oil and Gas Corp.* vs. *Sheets*, 313 U.S. 100, 108-109, 61 S. Ct. 969, 85 L. Ed 1214 (1941).

Respondent would point out that in diversity removal cases the defendants have not been beset upon by strangers in a strange land. Before jurisdiction in personam can be obtained in a state court against a citizen of another state, there must exist at least the minimal contacts required to meet the "traditional notions of fair play and substantial justice". *International Shoe Co.* vs. *Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In this particular instance, petitioners were exercising the privilege extended to them by the Commonwealth of Kentucky by operating their motor vehicle on its highways in Pike County, Kentucky, when they negligently injured Jay Lee Little, and his wife. (A, 9). By accepting the privilege and utilizating the highways, the petitioners should not be heard to claim that it offends the traditional notions of fair

play and substantial justice to require petitioners to try the case in the state court of the area voluntarily selected by them unless it be established that the court there is not impartial.

Petitioners do not assert partiality. They give no basis for their assertion that they do not feel that they could obtain an impartial trial in the state court. Petitioners were given an opportunity to present any factual basis which they might have to substantiate their claim that the state court is a partial tribunal. Petitioners offered nothing. The burden of proof to sustain jurisdiction was on them. The District Court properly remanded under the circumstances. *Cannon* vs. *United Insurance Company of America*, 352 F. Supp. 1212, 1220 (D. C., S. C. 1973).

Congress has considered removal a matter of privilege, and it has been so judicially construed. *Shamrock Oil Corp.* vs. *Sheets*, 313 U.S. 100, 106, Footnote 2, *Supra; In re La Providencia Development Corporation*, 406 F. 2d 251 (1st Cir. 1969). Petitioners cannot claim a privilege improvidently asserted by them.

B. 28 U.S.C. SECTION 1447 (d) PROVIDES THAT A REMAND ORDER "IS NOT REVIEWABLE ON APPEAL OR OTHERWISE". THIS PRECLUDES APPEAL, MANDAMUS AND PHOHIBITION.

There is no constitutional right to an appeal. By enacting Section 1447 (d) the Congress intended to limit review of remand orders and thus prevent

delay. *United States* vs. *Rice*, 327 U.S. 742, 751, 66 S. Ct. 835, 90 L. Ed. 982 (1946); *Kloeb* vs. *Armour and Co.*, 311 U.S. 199, 61 S. Ct. 213, 90 L. Ed. 124 (1940). *In re La Providencia Development Corporation, supra.*

Thus, it would seem that even if the respondent was erroneous, the remand order is not reachable by appeal, mandamus or prohibition.

VI. CONCLUSION

The remand order was appropriate in all of the circumstances, but even if erroneous, it is not reviewable by appeal, prohibition or mandamus.

We would suggest that this Court take a long, cold, hard look at removal jurisdiction and the impartial tribunal. We believe Congress intended the District Judge to have some discretion on remand in the circumstances. Most certainly that would relieve congestion and permit the elderly couple, Jay Lee Little and Lona Little, the speedy trial to which they are so justly entitled. The remand order should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Kilmer Combs, of counsel for the Respondent, Hon. H. David Hermansdorfer, Judge, United States District Court, Eastern District of Kentucky, and a member of the Bar of the Supreme Court of the United States do hereby certify that on the 24th day of April, 1975, copies of the foregoing Brief for Respondent were mailed, postage prepaid, to Hon. Frank G. Dickey, Jr., Landrum, Patterson and Dickey, 201 Security Trust Building, Lexington, Kentucky 40507, and I do hereby certify that all parties required to be served have been served.

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APPENDIX

UNITED STATES CODE, TITLE 82

Section 1332

Diversity of citizenship — Amount in controversy — Costs. — (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of

business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "states," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. (June 25, 1948, c. 646, § 1, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, P. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, P. L. 88-439, § 1, 78 Stat. 445.)

Section 1441

Actions removable generally. — (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to

the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. (June 25, 1948, c. 646, § 1, 62 Stat. 937.)

Section 1447

Procedure after removal generally. — (a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand

the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title shall be reviewable by appeal or otherwise. (June 25, 1948, c. 646, § 1, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, P. L. 88-352, Title IX, § 901, 78 Stat. 266.)